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No. 82-563

IN THE

Supreme Court of the United States

October Term, 1981

GRANT-OLIVER CORPORATION,
TRANS WORLD AIRLINES, INC., USAIR, INC., et al.,
Appellants

v.

MOON AREA SCHOOL DISTRICT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO AFFIRM

JOHN A. ROBB
JOHN A. ROBB, JR.
ROBB, LEONARD & MULVIHILL
1212 Frick Building
Pittsburgh, Pennsylvania 15219
(412) 281-5431
Counsel for Appellee

November 25, 1982

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

MOTION TO AFFIRM

The Appellees move that the judgment of the Pennsylvania Supreme Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

QUESTIONS PRESENTED

I. WHETHER A TAX UPON PATRONS OF NON-RESIDENTIAL PARKING FACILITIES LOCATED WITHIN THE MOON AREA SCHOOL DISTRICT IS VALID BECAUSE IT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION BY IMPOSING AN IMPERMISSABLE BURDEN ON THE RIGHT TO TRAVEL?

Answered in the affirmative by the Pennsylvania Supreme Court.

II. WHETHER THE TAX COMPLIES WITH THE COMMERCE CLAUSE AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE SCHOOL DISTRICT PROVIDES ADEQUATE BENEFITS TO NON-RESIDENT PATRONS WHO ARE ALMOST EXCLUSIVELY THE SUBJECT OF THE TAX.

Answered in the affirmative by the Pennsylvania Supreme Court.

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STATEMENT OF THE CASE

This appeal arises from a decision of the Pennsylvania Supreme Court which upheld the constitutional validity of a fifteen percent patron parking tax adopted by the Moon Area School District. The District, a duly constituted school district under the laws of the Commonwealth of Pennsylvania, enacted this tax pursuant to the Pennsylvania "Local Tax Enabling Act", Act Number 511 of 1965 and amendments thereto. Act 511 is a specific delegation of Legislative taxing authority which grants to local municipalities, including school districts, full taxing power as deliniated in Section 902 of the Act (53 Pa. C.S. §6902).

Specifically, Resolution 79-2 requires the operators of all non-residential parking facilities within the District to add the 15% tax to the consideration paid for parking. There are six non-residential parking operations in the District. The receipts from the tax are to be used solely for the School District's general revenue purpose. The tax is imposed upon all patrons of all non-residential parking facilities within the School District. This tax is on the purely local activity of parking of storing a car in the District. The parking facilities affected by the tax are used by patrons of commercial establishments located at the airport, individuals who are seeing passengers off or greeting passengers as they arrive at the airport, and passengers traveling in interstate and intrastate flights from the airport. The local patrons of the parking facilities can have no other tax imposed on them in any other state for this parking transaction.

The School District confers many benefits, both direct and indirect upon non-residents who enter the geographic confines of the District. The parking lots are

available in the District at the motorists pleasure and for his service and convenience. The District's many recreational facilities and parks are open to residents and non-residents alike and are often used by non-resident travelers staying at near-by motel facilities.

Concededly, a large percentage of the parking spaces are used by individuals utilizing the facilities at the Greater Pittsburgh International Airport. However, this is a local activity which occurs prior to any interstate travel which may or may not follow. An individual who is departing from the Airport has a number of options available to him. He may either take a bus, cab, limousine or be driven to the terminal; or he may drive his car and park in one of the concessions operated within the District. The lots in the District are merely an added convenience to the patrons.

The adoption of Resolution 79-2 was challenged by the Appellants herein and others who filed a statutory appeal from the tax on April 6, 1979, pursuant to §6906 of Pennsylvania's Local Tax Enabling Act, Act No. 511 of 1965, P.L. 1257, 53 Pa. C.S. §6901 et seq., in which they asserted the unconstitutionality of the tax.

The Court of Common Pleas of Allegheny County, Pennsylvania held that the tax was invalid as violative of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The School District appealed to the Commonwealth Court of Pennsylvania which affirmed the lower courts order by adopting as its own the opinion of the Court of Common Pleas.

The Pennsylvania Supreme Court, in a unanimous decision, reversed the lower court's holding and found that the tax did not violate the Commerce Clause or the

Due Process Clause of the U.S. Constitution. Appellants then filed with the Pennsylvania Supreme Court a notice of appeal to this court.

REASONS FOR GRANTING THE MOTION TO AFFIRM

I. A Tax Upon Patrons of Non-Residential Parking Facilities Located Within The Moon Area School District Does Not Violate the Commerce Clause of The United States Constitution by Imposing a Constitutionally Impermissable Burden on Interstate Commerce or on the Right to Travel.

Appellants, herein, contend that the School District Tax is a "head tax" which violates the Commerce Clause, Article 1, Sec. 8 of the United States Constitution, by placing an impermissable burden on the right to travel. In this situation, Congress has acted affirmatively when it expressly *prohibited* "head taxes" on persons traveling in air commerce and expressly *permitted* "sales or use taxes" on the sale of goods or services. Pub.L. 85-726, Title XI, §1113, as added, Pub.L. 93-94 §7(a), June 18, 1973, 87 Stat. 90, 49 U.S.C.A. §1513.

The Pennsylvania Supreme Court has construed this tax to be "a sales and use tax":

> "A head tax is a tax reckoned at a fixed amount for each head (person) in a designated class. The tax here is not on the heads of persons traveling in air commerce or on the carriage of persons traveling in air commerce. The operating incidence of the tax is the transaction of parking in non-residential parking lots in the School District which are located at or near the Pittsburgh International Airport. The tax is borne by the patrons of the parking operations. The

measure of the tax is the consideration paid for the parking transaction. It is not a tax on the right to travel and clearly Congress has not prohibited such a tax under 49 U.S.C.A. 1513". *James E. Tricco, James A. Davis, et al. vs. Moon Area School District*, Pa., 446 A.2d 234 (1982). (App.13a)[1].

The Supreme Court of the United States is bound by the construction given by the highest State Court to a statute or local ordinance of that state. *New York vs. Ferber*, 50 U.S.L.W. 5077 (U.S. July 2, 1982) (No. 81-55), *Shuttlesworth vs. City of Birmingham*, 86 S.C. 211 (1965).

Because the Pennsylvania Supreme Court has construed the tax to be a "sales and use tax" and not a "head tax" on the right to travel, this Court is bound by that determination. The question remains, however, whether this sales and use tax is violative of the negative implications of the Commerce Clause. The Pennsylvania Supreme Court has held that it is not. *James E. Tricco, et al., supra.* (App. 17a).

In reviewing a Commerce Clause challenge to a local tax, the focus is upon the practical effect of the tax to determine whether the tax substantially affects or is connected with interstate commerce. *Commonwealth Edison Co. vs. Montana*, 453 U.S. 609 (1982).

Interstate Commerce is not immune, however, from state taxation.[2] State taxes levied on interstate commerce are not per se invalid. *Commonwealth Edison Co.*

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1. "App". references are to Appendix A of the Appellant's Jurisdictional Statement.

2. *Western Livestock Bureau vs. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

vs. Montana, supra; Washington Revenue Dept. vs. Assoc. of Washington Stevedoring Co., 435 U.S. 734 (1978), *Complete Auto Transit, Inc. vs. Brady*, 430 U.S. 274 (1977).

The Pennsylvania Supreme Court found that the tax in question is a part of the flow of or is connected with interstate commerce. The Court upheld the tax, however, holding that the Moon Area School District Tax fully complied with the requirements of *Complete Auto Transit, supra.*

The test of *Complete Auto Transit* and *Wash. Rev. Dept.* now controls the question of a direct tax on the privilege of engaging in interstate commerce and any tax that is challenged under the Commerce Clause.[3] The test is a four-fold one:[4]

1. Is the tax applied to an activity with a substantial nexus to the taxing state?
2. Is the tax fairly apportioned?
3. Does the tax discriminate against interstate commerce?
4. Is the tax fairly related to the services provided by the taxing body?

There is without any doubt a substantial nexus to the taxing body or state since all of the parking lots subject to the tax are located entirely within the taxing District.

With regard to the apportionement and discrimination aspects of the four-prong test, an examination of the

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3. *Merrion et al., DBA Merrion & Bayless, et al. v. Jicarella Apache Tribe, et al.*, 50 U.S.L.W. 4169 (U.S. January 25, 1982) (No. 80-11).

4. *Complete Auto Transit, supra*, at 279; *Wash. Rev. Dept., supra*, at 747.

recent case of *Budget Rent-A-Car vs. Multnomah County*, 287 OR. 93, 597 P.2d 1232 (1979) is extremely helpful. Budget presents a remarkably similar fact situation to the present tax. In fact, the local resolutions themselves are very similar. Therein, a county imposed on every person who rented a motor vehicle, a 10% tax on the gross rental value to be collected by the provider of the rented vehicle. A unanimouns Supreme Court of Oregon sustained the tax against a Commerce Clause challenge. The facts indicated that approximately 75% of automobile rentals in Multnomah County take place at the Portland International Airport, *mostly by non-residents engaged in interstate travel.* ID. at 1236 (emphasis added).

The Oregon Supreme Court then quoted from the three United States Supreme Court cases which undoubtedly comprise the modern approach to Commerce Clause analysis of the state taxation questions. *Western Livestock vs. Bureau, supra; Complete Auto Transit, Inc. vs. Brady, supra; Wash. Dept. of Rev. vs. Assoc. of Stevedores, supra.* Applying these principles, the court held that this tax was constitutional and should be upheld.

The Supreme Court of Oregon recognized that of the four categories listed in *Complete* and *Wash. Rev.*, the two which presented the most serious problems are apportionment and discrimination. *Budget, supra* at 1239. The tax on automobile rentals, just as the tax in the School District in the present case, was not apportioned. The purpose of apportionment "... is not to segregate interstate from intrastate commerce in order to immunize the latter but only to avoid taxation by more than one state." ID at 1240. If there is no danger of multiple taxation then there is no need for apportionment. Since the act of parking at a non-residential lot in the School

District is the legal incidence of the tax, and it can occur in no other place, no other locatility or state could tax the act of parking. The Moon Township Gross Receipt parking tax is on the incidence of doing business measured by gross receipts, and can not support a claim of multiple taxation. *James E. Tricco, et al., supra.* (App. 15a).

The claim that the tax discriminates against interstate commerce is equally without merit. In *Budget*, supra, the Supreme Court of Oregon stated that discrimination "... implies a comparison, an objection not to some burdensome impostition as such but to differential treatment where such treatment is constitutionally forbidden." ID. at 1240. The School District tax applies to all non-residential parking spaces in the district and the rental tax in Multnomah County applied to all rentals in the county. Equaltiy of treatment was achieved.[5] The tax burden in the School District is borne according to the extent of use of the parking facilities and not on a distinction between patrons using interstate air commerce and patrons engaged in intrastate or local commerce.

Thus, under the foregoing analysis, it is evident that the parking tax in question satisfies the first three prongs of the *Complete Auto* test. The appellee, herein, strongly urges this court to recognize how *Complete Auto* and *Wash Rev.* were applied in the similar fact situation of *Budget Rent-A-Car* noted above, and that courts analysis of the four-prong test.

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5. "... Equality is its aim. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser within the state, regardless of the relation with interstate commerce." See *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 49 (1937).

The Appellant's most stringent challenge to the School District Tax is under the fourth prong of the *Complete Auto* and *Wash. Rev.* tests namely, whether the tax is fairly related to the services or benefits provided by the state. Appellants contend that the District provides no benefits in exchange for the tax, and as such the tax violates the Commerce Clause and the Due Process Clause of the United States Constitution. The "benefits test" is applicable to both the Commerce Clause and Due Process analysis involving a local tax, and as such it will be fully elaborated upon in the next section of this argument. As will be shown, the parking tax in question satisfies the fourth prong of the *Complete Auto test* because the tax is fairly related to the services or benefits provided by the School District.

From the above, it is clear that the present tax is not vulnerable to a Commerce Clause challenge and, therefore, the Pennsylvania Supreme Court's holding on this issue must be affirmed.

II. The Parking Tax in Question Does Not Violate the Commerce Clause or the Due Process Clause of The United States Constitution Because the Taxing School District Provides Numerous Benefits to Non-Resident Patrons Traveling in Interstate Commerce.

The Pennsylvania Supreme Court held that the instant tax did not violate the Commerce Clause or the Due Process Clause of the U.S. Constitution because the School District provided adequate benefits to the taxpayers in exchange for the tax. *James E. Tricco, et al., supra*, (App. 20a).

It is important in the area of this analysis to recognize that pursuant to the local Tax Exabling Act, 53 PA. C.S. §6901, supra, the Commonwealth of Pennsylvania

has delegated to the School District, its power and authority to tax. Therefore, the District, in duly enacting Resolution 79-2, is merely acting pursuant to this delegated authority.

In reviewing a "benefits" analysis of a local tax to determine its constitutionality, undeniably, *Wisconsin v. J.C. Penney*, 311 U.S. 345 (1940) is the controlling prescedent. The test as set out in *J.C. Penney* is as follows:

> "A state is free to pursue it's fiscal policies, unembarrassed by the Constitution, if by the practical operation of the tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an *orderly, civilized society.*"
>
> "The simple but controlling question is whether the state has given anything for which it can ask in return. The substantial privilege of carrying on business in Wisconsin which has been given, clearly supports the tax . . . " *ID* 444-445.

Thus, it is clear from the above case, all that is required in order to levy a state or local tax is some minimal contact with the state or subdivision or some "nexus" such as doing all or part of a business or transaction within the geographical confines of the taxing body. This minimal contact is all that is required to avoid scrutiny and invalidation as arbitrary or capricious under the Due Process Clause.

The instant School District affords non-residents the right to do business or park their vehicles within the

District which is all that is required as per the bench mark decision of *J.C. Penney.*

Further, in *Carmichael vs. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937) this Court stated that:

"... The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the *privilege of living in an organized society*, established and safeguarded by the devotion of taxes to public purposes. *Id at 522.* (emphasis added)[6].

Appellants would have this court believe that a direct and concrete benefit or quid pro quo be conferred upon non-residents in return for the right to tax that non-resident's activities which take place within the taxing district. This simply is not and has never been the test. *J.C. Penney* and *Carmichael Coke* absolutely refute Appellant's line of reasoning.

There have been numerous cases which have subsequently cited, with approval, the simple test announced in *J.C. Penney* and *Carmichael Coke—Commonwealth Edison Co. vs. Montana*, supra; *Standard Press Steel vs. Washington*, 419 U.S. 560 (1974); *General Motors Corp. vs. Washington*, 337 U.S. 436 (1964); *Nelson vs. Sears Roebuck Co.*, 312 U.S. 359 (1940). Everyone of these opinions listed above detail this simple "benefits-burden" theory, namely, whether the taxing body has given anything to promote an orderly society for which it can, in return, impose a tax.

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6. The fourth prong of the four part test of *Complete Auto* for Commerce Clause scrutiny of a state tax, as refined in *Commonwealth Edison vs. Montana*, supra at 625 n.14, 18, is derivitive of *Carmichael v. Southern Coal & Coke*, supra, and *J.C. Penney, supra.* See *James E. Tricco, et al.* at 243, N.15.

The benefits provided by the School District are numerous. Public education is a benefit of an organized society. Non-resident patrons and operators of the parking facilities are benefitted by the activity of transacting business in the District. Non-resident patrons of the parking facilities are benefitted because the parking lots provide easy access to the Airport and surrounding commercial establishments and hotels. The School District also provides recreational facilities and parks available to non-residents and residents alike. The services, facilities and conveniences provided by the School District are more than sufficient benefits to non-residents to constitute the necessary *general benefit of living in an orderly and civilized society.* Because the School District provides valuable benefits to non-residents in exchange for the tax imposed, the challenge to the tax under a Due Process theory must fail.

From the above, it is clear that there is no Due Process violation. Also, the fourth prong of the *Complete Auto Transit* test is satisfied. Consequently, the Pennsylvania Supreme Court's holding that the tax in question does not violate either the Commerce Clause or the Due Process Clause of the U.S. Constitution must, therefore, be in all respects affirmed.

CONCLUSION

For the foregoing reasons, the Judgment of the Pennsylvania Supreme Court should be in all respects affirmed.

Respectfully submitted,

JOHN A. ROBB
JOHN A. ROBB, JR.
ROBB, LEONARD & MULVIHILL
1212 Frick Building
Pittsburgh, Pennsylvania 15219
(412) 281-5431

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Motion to Affirm has been made on this 22nd day of November, 1982 by delivering three copies thereof to the offices of the following attorneys, who are counsel for all parties to be served:

JOHN H. BINGLER, Esquire
2900 Grant Building
Pittsburgh, Pennsylvania 15219

RICHARD H. MARTIN, Esquire
10th Floor Frick Building
Pittsburgh, Pennsylvania 15219

JEFFREY S. BLUM, Esquire
2900 Grant Building
Pittsburgh, Pennsylvania 15219